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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

SUE HEROLD, Plaintiff and Appellant, v. CITY OF LOS ANGELES, Defendant and Respondent.	B285935 (Los Angeles County Super. Ct. No. BC562085)

APPEAL from orders of the Superior Court of Los Angeles County. Deidre Hill, Judge. Affirmed.

McNicholas & McNicholas, Matthew S. McNicholas, Douglas Winter, Courtney C. McNicholas; Esner, Chang & Boyer, Stuart B. Esner, Andrew N. Chang and Steffi Jose for Plaintiff and Appellant.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Shaun Dabby Jacobs, Deputy City Attorney, for Defendant and Respondent.

* * * * * * * * * *

Plaintiff and appellant Sue Herold appeals from the trial court's entry of summary judgment in favor of her former employer, defendant and respondent City of Los Angeles (City), on her complaint for violations of the California Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; hereafter FEHA).

The trial court found plaintiff's claims for sexual orientation discrimination and retaliation under FEHA were time-barred. Plaintiff contends there were triable issues of material fact precluding summary judgment. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff began her career as a police officer with the Los Angeles Police Department (LAPD) in 1984. Plaintiff was continuously employed with the LAPD until 2015 when she retired. Plaintiff is a lesbian and one of the first openly gay active-duty police officers in the LAPD.

In 1987, plaintiff was one of two plaintiffs in a lawsuit against the City alleging widespread discrimination and harassment of gay and lesbian officers at the LAPD (*Grobeson v. City*). The *Grobeson* action was settled in 1992. Starting with her participation in *Grobeson*, plaintiff became a recognized leader and advocate for the rights of gay and lesbian officers in the LAPD.

In 1995, plaintiff was awarded a paygrade advancement from Police Officer II to Police Officer III. Plaintiff was promoted again in November 1998 to the position of Senior Lead Officer with the rank of Police Officer III+1, a "coveted position" in the LAPD. Plaintiff was assigned to the Devonshire Division, where she received commendations and positive performance evaluations for her service.

In 2006, a personnel complaint was initiated against plaintiff (CF No. 06-1850) based on the LAPD's investigation of the allegations of Evelyn Hoel, with whom plaintiff had a previous relationship. Ms. Hoel claimed plaintiff came to her home one evening uninvited and refused to leave. The incident prompted a response by the LAPD after neighbors called 911. During the course of the LAPD's investigation of the alleged domestic incident, Ms. Hoel recanted, but the complaint was ultimately sustained and plaintiff received an official reprimand. In her response to the complaint pursuant to *Skelly v. State Personnel Board* (1975) 15 Cal.3d 195 (*Skelly*), plaintiff did not raise any contention that she was treated unfairly or differently due to her sexual orientation.

Up until 2009, the LAPD's internal departmental manual required a showing of good cause before an officer in advanced pay grades, like plaintiff, could be subjected to a demotion to a lower paygrade or rank. In 2009, the LAPD implemented Special Order No. 47 which gave commanding officers broad discretion to demote an officer by lowering their paygrade or rank without a showing of good cause. The Los Angeles Police Protective League filed an action in the superior court challenging the validity of Special Order No. 47.

A second personnel complaint was initiated against plaintiff (CF No. 09-001906) in 2009 based on allegations by another woman with whom plaintiff had a previous relationship, Loretta Vasquez. Ms. Vasquez alleged, among other things, that plaintiff had vandalized a desk by writing negative comments on it with permanent marker (e.g., Ms. Vasquez was a liar, a gold-digger, etc.). The LAPD undertook an investigation. In her *Skelly* response to the complaint, plaintiff admitted she wrote on

the desk and apologized for her behavior, but contended the desk belonged to her and therefore it was not vandalism. Plaintiff did not raise any contention that the LAPD's handling of the complaint was discriminatory or biased. The vandalism allegation was sustained. Plaintiff's commanding officer, Captain Sean Kane, recommended a 10-day suspension.

LAPD Deputy Chief Michel Moore disagreed with Captain Kane's recommended punishment and ordered instead that plaintiff receive a conditional official reprimand in accordance with the newly implemented Special Order No. 47, providing that if plaintiff received another similar complaint within five years, then she would face a 10-day suspension.

In February 2010, additional allegations were raised by Ms. Vasquez, including that plaintiff had stolen a ring from her, and a third personnel complaint was initiated (CF No. 10-000461). All allegations were deemed unresolved or unfounded, except for one. The LAPD sustained an allegation that plaintiff had improperly accessed LAPD computer records to run Ms. Vasquez's license plate number and vehicle registration without any lawful reason to do so. Plaintiff admitted she accessed the computer records related to Ms. Vasquez, without authorization, in July and September 2007. Captain Kane recommended a 22-day suspension which plaintiff did not challenge.

In November 2010, Captain Kane, noting that plaintiff had received three personnel complaints in four years, recommended plaintiff be demoted to the rank of Police Officer II, and that she be transferred from the Devonshire Division.

Plaintiff challenged her demotion by filing an administrative appeal in accordance with the LAPD's internal

procedures. Plaintiff did not raise any claims of discrimination or harassment as the basis for her appeal. The administrative appeal hearing took place on July 19, 2011. The hearing officer recommended that plaintiff's demotion be sustained.

In August 2011, LAPD Chief Charlie Beck adopted the recommendation of the administrative hearing officer to sustain plaintiff's demotion to the rank of Police Officer II. Plaintiff was thereafter transferred to the West Valley Division where she was given various assignments, including as the community relations officer and as the latent print officer in the detective unit.

On October 31, 2011, plaintiff filed a petition for a writ of mandate alleging that her demotion was improperly imposed in violation of the Public Safety Officers' Procedural Bill of Rights Act (POBRA, Gov. Code, § 3300 et seq.), as well as her rights under the due process and contract clauses of the United States and California Constitutions. The petition did not raise any allegations related to sexual orientation discrimination, harassment or retaliation.

In February 2012, in the separate action filed by the Los Angeles Police Protective League challenging the validity of Special Order No. 47, the superior court issued a preliminary injunction precluding the LAPD from further use and enforcement of the order.

On November 1, 2013, plaintiff filed a claim with the California Department of Fair Employment and Housing in which she alleged that her 2011 demotion from the rank of Police Officer III+1 to Police Officer II was in violation of FEHA. Plaintiff contended the demotion of her paygrade and rank was based on her sexual orientation and also in retaliation for her

conduct in speaking out about such discrimination at the LAPD. At her request, plaintiff received an immediate right to sue letter.

By early 2014, plaintiff was still working in the West Valley Division at the rank of Police Officer II and her writ petition remained pending. During this time period, plaintiff was advised she needed to qualify (demonstrate proficiency) with a shotgun in accordance with LAPD policy. Plaintiff inquired about whether the qualification requirement applied to her since she was in her 30th year of service with the LAPD. Thereafter, plaintiff's supervisor, Sergeant Elaine Dewberry, issued a comment card to plaintiff's file explaining that the requirement did apply to her because she had not yet completed 30 years of service, did not hold the rank of Captain and was not otherwise medically exempt from the requirement. It is undisputed the comment card did not negatively affect plaintiff's pay, benefits, pension credits or work assignment.

Plaintiff was also told she was going to have to attend daily roll call, check in and out with a supervisor and complete a Daily Field Activity Report (DFAR). Plaintiff complained about the level of supervision being imposed, particularly in light of her experience and because she was working with the detective unit and not out on patrol. Within a week, it was determined by her supervisors that she would not have to attend daily roll call, check in and out with a supervisor or complete a DFAR. Plaintiff conceded in her deposition that she never had to perform these requirements.

In May 2014, plaintiff's writ petition was granted. The trial court found plaintiff had been denied a fair hearing because Special Order No. 47 had been found invalid and because the procedures followed by the LAPD in implementing the demotion

violated POBRA. The court ordered plaintiff reinstated to her former rank of Police Officer III+1 with back pay pending any new administrative hearing conducted in accordance with the former good cause standard that had been in place prior to implementation of Special Order No. 47.

In September 2014, plaintiff was reinstated to the rank of Police Officer III+1.

On October 27, 2014, plaintiff filed this action asserting two causes of action under FEHA for discrimination based on sexual orientation and retaliation based on plaintiff's conduct in speaking out about discriminatory employment practices at LAPD.

In 2015, plaintiff retired from the LAPD.

The City answered the complaint and asserted numerous affirmative defenses, including that the claims were barred by the applicable statute of limitations.

The City moved for summary judgment in November 2016. After entertaining argument on the court's tentative which indicated its inclination to find plaintiff's claims time-barred, the court continued the hearing. Before the next hearing was held, plaintiff filed a supplemental opposition arguing the claims were timely based on the doctrine of equitable tolling. The City filed an ex parte application requesting an order striking the untimely opposition. At the continued hearing, the court granted the City's application and struck plaintiff's untimely supplemental opposition. The court entertained additional argument and took the matter under submission. Thereafter, the court issued its ruling granting the City's motion. Judgment was entered in favor of the City on August 25, 2017.

This appeal followed.

DISCUSSION

A defendant moving for summary judgment must show "that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to the cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Summary judgment is appropriate where "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (*Id.,* subd. (c).)

Our Supreme Court has made clear the purpose of the 1992 and 1993 amendments to the summary judgment statute was " 'to liberalize the granting of [summary judgment] motions.' " (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542; *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854.) Summary judgment is no longer a "disfavored" remedy. Rather, it "is now seen as a 'particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case." (*Perry,* at p. 542.) On appeal, "we take the facts from the record that was before the trial court . . . . ' "We review the trial court's decision de novo, considering all the evidence set forth in the moving and opposing papers except that to which objections were made and sustained." ' " (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1037 (*Yanowitz*), citations omitted.)

A "plaintiff suing for violations of FEHA ordinarily cannot recover for acts occurring more than one year before the filing of the [FEHA administrative complaint]." (*Jumaane v. City of Los Angeles* (2015) 241 Cal.App.4th 1390, 1400 (*Jumaane*); see also Gov. Code, § 12960, subd. (d); *Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 822-823 (*Richards*).)

Plaintiff filed her FEHA complaint with the Department of Fair Employment and Housing on November 1, 2013. Thus, plaintiff cannot recover for alleged discriminatory or retaliatory acts that occurred *before November 1, 2012*, unless the continuing violation doctrine applies. (*Jumaane*, *supra,* 241 Cal.App.4th at p. 1400.) The doctrine, as articulated by the Supreme Court, "comes into play when an employee raises a claim based on conduct that occurred in part outside the limitations period." (*Richards*, *supra*, 26 Cal.4th at p. 812.) In such a case, the pertinent inquiry is "whether the employer's conduct occurring outside the limitations period is sufficiently linked to unlawful conduct within the limitations period that the employer ought to be held liable for all of it." (*Cucuzza v. City of Santa Clara* (2002) 104 Cal.App.4th 1031, 1042 (*Cucuzza*).)

"The continuing violation doctrine requires proof that the conduct occurring outside the limitations period was (1) similar or related to the conduct that occurred within the limitations period; (2) the conduct was reasonably frequent; and (3) the conduct had not yet become permanent." (*Jumaane*, *supra*, 241 Cal.App.4th at p. 1402; accord, *Yanowitz*, *supra*, 36 Cal.4th at p. 1059.) If the plaintiff can establish these elements, then the continuing violation doctrine "permits a plaintiff to recover for the unlawful practices occurring outside the limitations period." (*Jumaane,* at p. 1402.)

In adopting the continuing violation doctrine, the Supreme Court acknowledged it would be inequitable to employers to allow employees to delay the limitations period indefinitely. (*Richards*, *supra*, 26 Cal.4th at pp. 822-823.) Hence, the third prong of the doctrine was included which sets an outside limit on how long a course of conduct may continue before the statute of limitations

for the violation begins to run. (*Ibid*.) The third prong thus provides that the "statute of limitations begins to run when an alleged adverse employment action *acquires some degree of permanence or finality*." (*Yanowitz*, *supra*, 36 Cal.4th at p. 1059, italics added.)

Viewing the evidentiary record favorably to plaintiff and drawing all reasonable inferences from the record, we conclude there are no material triable issues supporting application of the continuing violation doctrine. Virtually all of the acts plaintiff identified as unlawful conduct in violation of FEHA occurred before 2010, culminating in her demotion in early 2011 to the rank of Police Officer II. It is undisputed that in August 2011, after the conclusion of plaintiff's administrative appeal, Chief Beck adopted the recommendation of the administrative hearing officer to sustain plaintiff's demotion. There can be no question but that plaintiff's demotion had achieved permanence within the LAPD by August 2011. Thus, by that time, plaintiff was on notice that any further effort to challenge her demotion would require litigation. Nonetheless, plaintiff *waited over two years before filing her FEHA complaint* with the Department of Fair Employment and Housing, in which she raised, for the first time, her contention that her demotion was based on discriminatory animus and in retaliation for her years speaking out about discrimination in the LAPD.

The only allegedly violative conduct that occurred within the limitations period (i.e., *after* November 1, 2012) were the two acts that occurred after plaintiff was transferred to the West Valley Division. After that transfer, plaintiff was no longer under the command of Captain Kane, whom she contended had acted unfairly toward her. The two acts occurring after

November 1, 2012 were (1) the order requiring plaintiff to attend daily roll call, check in and out with a supervisor and complete a DFAR; and (2) Sergeant Dewberry's submission of a negative comment card about plaintiff's failure to qualify with a shotgun.

Plaintiff conceded she immediately objected to the first act, and her supervisors withdrew the order. As for second act, the shotgun proficiency requirement applied to all officers who, like plaintiff, had not yet completed 30 years of service, had not obtained the rank of captain and did not have a medical exemption. Plaintiff was not singled out. Plaintiff conceded she suffered no adverse employment consequences because of Sergeant Dewberry's comment card with respect to her salary, benefits, pension credit or work assignments.

There is no similarity between these two routine employment decisions at the West Valley Division and the conduct that occurred between 2006 and 2010 while plaintiff was at Devonshire Division and was the subject of three personnel complaint investigations that led to Captain Kane recommending her demotion. These actions are not reasonably perceived as a continuous course of conduct.

In addition to the post-November 1, 2012 acts being dissimilar to the previous acts of which plaintiff complains, we also find the previous acts had become final and permanent by August 2011, more than two years before plaintiff finally chose to file her FEHA complaint. As such, plaintiff has failed to demonstrate a triable issue of fact as to the continuing violation doctrine. (See, e.g., *Cucuzza*, *supra*, 104 Cal.App.4th at p. 1042 [no trial issue as to continuing violation doctrine where no triable issue shown as to the third required prong].)

To the extent plaintiff raised additional acts of alleged discriminatory treatment in her opposition papers, none of those acts was alleged in her pleadings, and all of them occurred *before 2005*, well outside the statute of limitations period.

Plaintiff contends we can consider her argument that equitable tolling applies to render her claims timely. Plaintiff failed to timely raise this argument in the trial court, and the court properly struck her belatedly filed supplemental opposition. Because plaintiff did not preserve the argument below, she has forfeited the contention on appeal. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997.)

In any event, plaintiff has failed to show equitable tolling would be applicable here. "[E]quitable tolling requires timely notice, and *lack of prejudice*, to the defendant, and reasonable and good faith conduct on the part of the plaintiff." (*Addison v. State* (1978) 21 Cal.3d 313, 319, italics added.) Plaintiff never raised any claims of sexual orientation discrimination or retaliation in challenging the LAPD's handling of the three personnel complaints that led to her demotion, and never raised such claims in her administrative appeal of her demotion, or in her writ petition seeking reinstatement. The City did not have "the opportunity to begin gathering their evidence and preparing their defense" to such claims. (*Ibid.*) Therefore, plaintiff has not shown the requisites for application of equitable tolling.

Finally, we conclude there are no triable issues of discrimination or retaliation for the two acts alleged to have occurred within the limitations period.

In order to establish a prima facie case of discrimination or retaliation under FEHA, plaintiff must show she was subjected to an adverse employment action. (See, e.g., *Joaquin v. City of Los*

Angeles (2012) 202 Cal.App.4th 1207, 1220 [claim for discrimination under FEHA requires proof the employee "suffered an adverse employment action"] & *Jumaane*, *supra*, 241 Cal.App.4th at p. 1408 [same regarding claim for retaliation]; see also Gov. Code, § 12940, subd. (a).) While an adverse action need not be an "ultimate" act like termination, it nevertheless must *materially* affect the terms, conditions, or privileges of employment. (*Yanowitz*, *supra*, 36 Cal.4th at p. 1054.) "A change that is merely contrary to the employee's interests or not to the employee's liking is insufficient." (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1455.)

Plaintiff admitted in her deposition that she never had to comply with the order to attend the daily roll call, check in with a supervisor or complete a DFAR. Plaintiff also admitted the negative comment card regarding her failure to qualify with a shotgun did not adversely impact her pay, benefits, pension credits or work assignment. Plaintiff failed to raise a triable issue she suffered an adverse employment action within the limitations period.

DISPOSITION

The judgment entered in favor of defendant and respondent City of Los Angeles is affirmed.

Defendant and respondent shall recover its costs of appeal.

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. STRATTON, J.